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No. 62862-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL TYRONE GRESHAM,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Kenneth L. Cowser

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

RCW 10.58.090 allows admission in a prosecution for a sex offense, evidence that the defendant committed a prior sex offense, for the purpose of showing the defendant's propensity to commit the crime. The statute therefore directly and expressly conflicts with ER 404(b), which categorically bars the admission of propensity evidence. Because the statute conflicts with a procedural rule promulgated by the Washington Supreme Court, it usurps the constitutional role of the judiciary and violates the separation of powers doctrine.

Alternatively, RCW 10.58.090 is a substantive rule of evidence that is specifically directed at criminal defendants and is intended to supply a deficiency of legal proof common in sex offense prosecutions. Because the statute effectively lowers the State's burden of proof, it is ex post facto as applied in this case, in violation of the state and federal constitutions.

B. ASSIGNMENTS OF ERROR

1. RCW 10.58.090 violates the constitutional separation of powers doctrine.

2. RCW 10.58.090, as applied in this case, violates the Ex Post Facto Clause of the federal constitution.

3. RCW 10.58.090, as applied in this case, violates the Ex Post Facto Clause of the state constitution.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In Washington, the constitutional separation of powers doctrine prohibits the Legislature from enacting procedural statutes that conflict with court rules. The Washington Supreme Court deems rules of evidence to be procedural rules subject to the separation of powers doctrine. Does RCW 10.58.090, which directly conflicts with ER 404(b), violate the separation of powers doctrine?

2. Under the Ex Post Facto Clause of the federal constitution, a statute that changes the rules of evidence for the purpose of supplying a deficiency of legal proof and convicting offenders of a crime, may not be applied to crimes pre-dating its enactment. Does the application in this case of RCW 10.58.090, which allows the State to rely on evidence of the accused's prior sex offenses, in order to convict him of a current sex offense, violate the federal Ex Post Facto Clause?

3. Under the Ex Post Facto Clause of the Washington Constitution, a law that alters a rule of evidence for the purpose of convicting a person of a crime, may not be applied retroactively.

Does RCW 10.58.090, which allows the State to introduce evidence of a defendant's prior sex offense, for the purpose of convicting him of a current sex offense, violate the state Ex Post Facto Clause, where the statute took effect after the alleged offenses?

D. STATEMENT OF THE CASE

The State charged Michael Gresham with four counts of child molestation in the first degree.¹ CP 127-28. The information alleged the offenses occurred between December 1, 1998, and September 5, 2002. CP 127-28.

Prior to trial, the State moved to admit evidence, pursuant to RCW 10.58.090 and ER 404(b), that Mr. Gresham had previously committed other sex offenses. RCW 10.58.090 permits the court to admit, in a criminal action in which the defendant is accused of a sex offense, "evidence of the defendant's commission of another sex offense or sex offenses . . . notwithstanding Evidence Rule 404(b)." RCW 10.58.090(1). The statute took effect on June 12, 2008. Laws 2008, ch. 90, § 2. Thus, the statute took effect after the alleged offenses but before the trial in this case.

The State sought to admit evidence that, in 1992, Mr. Gresham had raped a nine-year-old girl on two occasions.

¹ Mr. Gresham was originally charged with six counts of child molestation in the first degree, but the State later dismissed two of the counts.

10/21/08RP 29. Mr. Gresham was charged with two counts of rape of a child but pled guilty to one count of second degree assault with sexual motivation and received a low-end sentence. 10/21/08RP 16. The State wished to admit the testimony of the victim about the prior offenses. 10/21/08RP 10.

The trial court found that the evidence of Mr. Gresham's prior sex offenses was not admissible under ER 404(b). CP 4-15.² The court found that there was insufficient evidence to conclude the prior and current individual molestations were part of a "common scheme or plan," and that the evidence fell under no other exception to ER 404(b)'s ban on propensity evidence. CP 9-11. But the court found the evidence was admissible pursuant to RCW 10.58.090. In particular, the court found the evidence was "necessary" to the State's case, because "evidence of the prior acts is the only form of evidence that could corroborate testimony of the current victim." CP 13-14.

At the jury trial, J.L. testified about the current allegations. She testified that Mr. Gresham touched her inappropriately several times when she was between the ages of 8 and 12. 11/04/08RP 127-57. Mr. Gresham was the husband of Leslie Gresham, a long-

² A copy of the court's written findings of fact and conclusions of law is attached as Appendix A.

time childhood friend of J.L.'s mother. 11/04/08RP 125. J.L. and her sister and brother would often spend time at the Gresham home, playing with the Greshams' two daughters, Kanisha and Janiece. 11/04/08RP 125-26. Occasionally J.L. would spend the night. 11/04/08RP 126. According to J.L., on one occasion, while she was sleeping with Kanisha in Kanisha's bedroom, Mr. Gresham entered the room, stood at the foot of the bed, and rubbed Jade's thigh while she pretended to be asleep. 11/04/08RP 127-30. He tried to get under the covers between her and Kanisha, but she acted as though she was waking up and he left the room.

11/04/08RP 129.

On another occasion, while Mr. Gresham was playing a wrestling game with J.L. and the other children, he wrestled her onto the bed and pressed his private parts against her private parts. 11/04/08RP 132-35. The two were fully clothed. 11/04/08RP 132-35. Mr. Gresham pushed himself up by putting his hands on her breasts. 11/04/08RP 132-35.

On a third occasion, J.L. was sleeping in Kanisha's bed at the Greshams' house when she awoke to find Mr. Gresham rubbing her "private parts" over her underpants but under her pajamas.

11/04/08RP 136-39. She scooted her body out of his reach and he

stopped and left the room. 11/04/08RP 139-40. Another time, while she was sleeping on the couch in the Greshams' living room, J.L. woke up to find Mr. Gresham leaning over the couch and rubbing her thigh and between her legs, under the covers but over her underpants. 11/04/08RP 140-43.

Finally, J.L. testified that one time when Mr. Gresham was at her house babysitting, he came into her bedroom while she pretended to be asleep, stood at the foot of the bed, lifted the covers and put his hand on her knee. 11/04/08RP145-53. She pretended to wake up, asked what he was doing, then told him to leave, which he did. 11/04/08RP 145-53.

J.L. testified she did not disclose these incidents until she was about 12 years old, when she told her mother that Mr. Gresham had touched her inappropriately. 11/04/08RP 159. At that time, J.L.'s mother told her that Gresham had been to jail before for doing something similar, but worse, to a family member. 11/04/08RP 162. The family decided not to call police, but J.L. was not to spend time at the Greshams' anymore. 11/04/08RP 196-97. Later, when J.L. was 14 or 15, she disclosed the molestations while filling out a questionnaire during a drug and alcohol evaluation. This time, police became involved. 11/04/08RP 161, 163.

A.C. testified about the prior alleged sex offenses. She testified Mr. Gresham had been the boyfriend of A.C.'s cousin, Jodi Stack. 11/04/08RP 215. According to A.C., one time in 1992, when she was nine years old, she spent the night at their house. 11/04/08RP 216. While she was sleeping in Jodi's daughter's bedroom alone, she woke up to find Mr. Gresham lying next to her in bed and touching her between her legs. 11/04/08RP 218. He touched her under her clothes and underpants and put his fingers inside her vagina. 11/04/08RP 219, 227-28. A few months later, she was sleeping in the same room when he again came into the room and touched her as before, under her clothes, putting his fingers inside her vagina. 11/04/08RP 220, 227-28. A.C. told Jodi and the police became involved. 11/04/08RP 221-22.

During closing argument, the prosecutor emphasized A.C.'s testimony about the prior offenses. The prosecutor argued the jury should give great weight to A.C.'s story because it was "remarkably similar" to J.L.'s. 11/06/08RP 461. The prosecutor emphasized Mr. Gresham did the "same thing" to A.C. as he did to J.L. 11/06/08RP 461. The prosecutor urged the jury to find the evidence of the prior offenses was highly relevant "because it's so similar. And what

does that show? That shows that this man does that, or he did it then, and he's done it again." 11/06/08RP 491.

The jury found Mr. Gresham guilty as charged of three counts of first degree child molestation and, for the fourth count, guilty of the lesser-included offense of attempted first degree child molestation. CP 39. At sentencing, the court found Mr. Gresham had a prior conviction for second degree assault with sexual motivation and was a "two-strike" offender. CP 41. The court therefore imposed a sentence of life without parole for each count. CP 45; 1/08/09RP 513-14.

E. ARGUMENT

1. RCW 10.58.090 VIOLATES THE CONSTITUTIONAL SEPARATION OF POWERS DOCTRINE BECAUSE IT DIRECTLY CONFLICTS WITH ER 404(b), A VALID PROCEDURAL RULE PROMULGATED BY THE WASHINGTON SUPREME COURT

RCW 10.58.090³ permits the court to admit, in a criminal action in which the defendant is accused of a sex offense, "evidence of the defendant's commission of another sex offense or sex offenses . . . notwithstanding Evidence Rule 404(b)." RCW 10.58.090(1). The statute directs courts to consider evidence of other sexual offenses in sexual misconduct prosecutions for any

³ A copy of the statute is attached as Appendix B.

purpose. RCW 10.58.090. By its express terms, the statute conflicts with ER 404(b), which categorically bans the admission of prior misconduct evidence for the purpose of "prov[ing] the character of a person in order to show action in conformity therewith." ER 404(b). The statute further conflicts with ER 404(b) to the extent it does not require courts to identify the purpose of the evidence or to limit its consideration by the jury for only that purpose.

As discussed below, in Washington, the Supreme Court has ultimate authority, inherent in the state constitution and delegated by statute, to promulgate rules governing procedures in state courts. Although that authority is often shared with the Legislature, it is well settled that where a procedural statute conflicts with a procedural rule promulgated by the court, the rule must prevail.

The Evidence Rules, which "govern the proceedings in the courts of the state of Washington," ER 101, are unquestionably a valid exercise of the Supreme Court's rule-making power. Washington courts recognize that rules of evidence are generally rules of procedure subject to the Supreme Court's ultimate authority and the constitutional separation of powers doctrine. Although the Legislature may enact statutes governing the admission of

evidence, courts do not hesitate to invalidate evidence statutes that conflict with the Supreme Court's evidence rules.

In this case, because RCW 10.58.090 directly conflicts with a procedural rule, ER 404(b), it usurps the Supreme Court's constitutional authority to govern the procedures of Washington courts and must be stricken.

a. Under the separation of powers doctrine, the Washington Supreme Court has ultimate authority to govern state court procedures, and where a statute directly conflicts with a court rule, the rule must prevail. The doctrine of separation of powers stems from the constitutional distribution of the government's authority into three branches. State v. Moreno, 147 Wn.2d 500, 505, 58 P.2d 265 (2002). The state constitution vests the "judicial power of the state" in the Supreme Court and the various inferior courts designated. Const. art. 4, § 1. Each branch of government wields only the power it is given. Moreno, 147 Wn.2d at 505. The purpose of the separation of powers doctrine "is to prevent one branch of government from aggrandizing itself or encroaching upon the 'fundamental functions' of another." Id. (quoting Carrick v. Locke, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)). The doctrine is essential to "the maintenance of a republican form of government,"

and in "guaranteeing the liberties of the people, and preventing the exercise of autocratic power." Washington State Bar Ass'n v. State, 125 Wn.2d 901, 906-07, 890 P.2d 1047 (1995) (citation omitted).

Although some overlap among the three branches of government is allowed, the separation of powers demands the independence of each branch. Moreno, 147 Wn.2d at 505. Thus, the question is "not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another." Id. (quoting Carrick, 125 Wn.2d at 135).

The function of the judicial branch is to govern court procedures. The Washington Supreme Court has inherent power to govern court procedures, stemming from article 4 of the state constitution. City of Fircrest v. Jensen, 158 Wn.2d 384, 394, 143 P.3d 776 (2006); State v. Fields, 85 Wn.2d 126, 129, 530 P.2d 284 (1975); Const. art. 4, § 1. The court also has power delegated by the Legislature to adopt rules of procedure. City of Fircrest, 158 Wn.2d at 394; Fields, 85 Wn.2d at 129; RCW 2.04.190. RCW 2.04.190 provides the supreme court the power "to regulate and prescribe by rule the forms for and the kind and character of the

entire pleading, practice and procedure to be used in all suits, actions, appeals and proceedings of whatever nature by the supreme court, superior courts, and district courts of the state."

Although the authority to govern matters of court procedure is often shared between the judicial and legislative branches, in Washington, unlike many other jurisdictions, the Supreme Court's authority to prescribe procedural rules takes precedence over the Legislature's. The intent of RCW 2.04.190, enacted in 1925, was to grant the courts sole authority to prescribe court procedure and practice. State ex rel. Foster-Wyman Lumber Co. v. Superior Court for King County, 148 Wash. 1, 4, 9, 267 P. 770 (1928); The Rule-Making Power of the Courts, 1 Wash. L. Rev. 163, 175, 228 (1925). RCW 2.04.200, enacted at the same time as RCW 2.04.190, makes clear that the court's rules of procedure trump the laws of the Legislature: "When and as the rules of courts herein authorized shall be promulgated all laws in conflict therewith shall be and become of no further force or effect." RCW 2.04.200; State v. Williams, 156 Wash. 6, 7, 286 P. 65 (1930) (RCW 2.04.090 and RCW 2.04.200 abrogated pre-existing statutes in conflict with the court's new rules).

Washington courts routinely and consistently recognize that the Supreme Court's procedural rules take precedence over conflicting legislative enactments. As the court explained in State v. Smith, 84 Wn.2d 498, 502, 527 P.2d 674 (1974), "[s]ince the promulgation of rules of procedure is an inherent attribute of the Supreme Court and an integral part of the judicial process, such rules cannot be abridged or modified by the legislature." See also, e.g., City of Fircrest, 158 Wn.2d at 394 ("Whenever there is an irreconcilable conflict between a court rule and a statute concerning a matter related to the court's inherent power, the court rule will prevail."); State v. Templeton, 148 Wn.2d 193, 217, 59 P.3d 632 (2002) ("Under Smith and Fields the validity of a court rule need not stand solely on either constitutional or statutory grounds. A nexus between the rule and the court's rule-making authority over procedural matters validates the court rule, despite possible discrepancies between the rule and legislation or the constitution."); State v. Ryan, 103 Wn.2d 165, 178, 691 P.2d 197 (1984) ("statutory enactments of evidentiary rules are subject to judicial review, this court being the final arbiter of evidentiary rules."); Fields, 85 Wn.2d at 129-30 (CrR 2.3(b), governing issuance of search warrants, trumps its counterpart in RCW 10.79.015).

The Washington Supreme Court's sole authority to govern matters of procedure in Washington courts is not shared by courts in many other jurisdictions. In 1925, when RCW 2.04.190 was enacted, the judiciary in most states was expressly limited by either constitution or statute from making rules that were inconsistent with statute. The Rule-Making Power of the Courts, *supra*, at 172-80. Today, the extent of state legislative competence over rules of procedure used in state courts still varies considerably. 1 John H. Wigmore, Evidence in Trials at Common Law, § 7, at 462 n.1 (Tillers rev. ed. 1983). For example, the constitutional provisions of several states clearly give the legislature sole authority to prescribe rules of practice and procedure, while in several other states, judicial decisions have established the principle of legislative supremacy. *Id.*

Similarly, in the federal system, the judiciary's power to "create and enforce nonconstitutional 'rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress.'" Dickerson v. United States, 530 U.S. 428, 437, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000) (quoting Palermo v. United States, 360 U.S. 343, 353 n.11, 79 S.Ct. 1217, 3 L.Ed.2d 1287 (1959)). The Rules Enabling Act directs the federal

courts to draft the rules of evidence, practice, and procedure for the federal courts, consistent with the Acts of Congress and subject to Congressional approval. See 28 U.S.C. §§ 2071-77. Thus, Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution. Dickerson, 530 U.S. at 437 (citations omitted).

b. The Washington Supreme Court's sole authority to govern court procedures includes the authority to promulgate rules of evidence. The court's constitutional authority to govern matters of court procedure contrasts with the Legislature's authority to govern matters of substance. Fields, 85 Wn.2d at 129; Smith, 84 Wn.2d at 501. "Substantive law prescribes norms for societal conduct and punishments for violations thereof. It thus creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated." City of Fircrest, 158 Wn.2d at 394 (quoting Smith, 84 Wn.2d at 501). Promulgation of state court rules creates procedural rights; creation of substantive rights is in the province of

the Legislature absent any constitutional prohibition. Templeton, 148 Wn.2d at 212.

The Washington Supreme Court has unequivocally held that the Evidence Rules fall within the court's constitutional and statutory authority to govern matters of procedure. City of Fircrest, 158 Wn.2d at 394. The language of ER 101 makes clear that the Evidence Rules govern the admissibility of evidence in Washington trials, and that in the event of an irreconcilable conflict between a rule and a statute, the rule will govern. ER 101 ("These rules govern proceedings in the courts of the state of Washington to the extent and with the exceptions stated in rule 1101."⁴); see also, e.g., Teter v. Old Colony Co., 190 W.Va. 711, 441 S.E.2d 728 (1994) (language of ER 101 alone, even without explicit constitutional authority, makes clear that legislative enactment contrary to provisions of Evidence Rules is invalid). The very fact of adoption of the Evidence Rules by the court "is conclusive of its determination that at least these rules as adopted are procedural." Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 310 (N.M. 1976).

⁴ According to the exceptions stated in ER 1101, the Evidence Rules do not apply to the determination of questions of fact preliminary to the determination of admissibility of evidence, or to various sorts of non-jury trial proceedings not relevant here. ER 1101(c).

Rules of evidence are rules of procedure, because they "pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated." City of Fircrest, 158 Wn.2d at 394 (quoting Smith, 84 Wn.2d at 501). Rules of evidence generally "strike at the very heart of a court's exercise of judicial power," in that they govern "the powers to hear facts, to decide the issues of fact made by the pleadings, and to decide the questions of law involved." State v. Mallard, 40 S.W.3d 473, 483 (Tenn. 2001). In criminal cases, "while [t]he legislature has the power to declare what acts are criminal and to establish the punishment for those acts as part of the substantive law[,] . . . the court regulates the method by which the guilt or innocence of one who is accused of violating a criminal statute is determined." State v. Losh, 721 N.W.2d 886, 891 (Minn. 2006) (citation omitted).

Washington courts consistently recognize that, pursuant to the court's sole authority over matters of procedure, the Evidence Rules take precedence over statutes that are directly in conflict. In City of Fircrest, 158 Wn.2d 384, for example, the court examined whether a statute that allowed the admission of BAC test results despite a suspect's challenges to them, conflicted with the rules of evidence. The court concluded that, because admission of the

evidence was permissive and not mandatory, the statute could be harmonized with the rules of evidence and did not violate the separation of powers doctrine. Id. at 399.

Similarly, in Ryan, 103 Wn.2d 165, the court examined whether the child hearsay statute conflicted with the court's authority to promulgate rules of evidence. The court concluded the statute did not conflict with the Evidence Rules, because "[l]egislative enactment of hearsay exceptions is specifically contemplated by the Rules of Evidence,⁵" and because the statute allowed admission of the child's statement only if it bore "particularized guarantees of trustworthiness." Id. at 178-79.

But where the court determines a statute *does* conflict with an evidence rule, after attempts to harmonize them, it will not hesitate to find the statute invalid. See, e.g., State v. Pollard, 66 Wn. App. 779, 783-84, 834 P.2d 51 (1992) (ER 1101, providing that rules of evidence do not apply at restitution hearings, superseded statute to the contrary); State v. Saldano, 36 Wn. App. 344, 350, 675 P.2d 1231 (1984) (ER 609 superseded pre-existing statute that

⁵ "ER 802 states: 'Hearsay is not admissible except as provided by these rules, by other court rules, or *by statute*.'" Ryan, 103 Wn.2d at 178 (emphasis in Ryan).

allowed admission of an accused's prior convictions for the purpose of affecting the weight of his testimony).

Courts in other jurisdictions in which the judiciary has sole authority over matters of procedure, generally agree that rules of evidence are rules of procedure that are subject to the separation of powers doctrine. See Johnson v. Rockwell Automation, Inc., ___ S.W.3d ___, 2009 Ark. 241, 2009 WL 1218362 (Ark. 2009) (statute limiting evidence that may be introduced relating to the value of medical expenses in tort action was procedural and violated separation of powers doctrine); State v. Zimmerman, 121 Idaho 971, 829 P.2d 861 (1992) (statute allowing admission of child's out-of-court statements regarding sexual or physical abuse was procedural and subject to separation of powers doctrine); Manns v. Commonwealth, 80 S.W.3d 439, 446 (Ken. 2002) (statute allowing admission at trial of evidence of defendant's prior juvenile adjudications was procedural and therefore violated separation of powers doctrine); People v. McDonald, 201 Mich. App. 270, 272, 505 N.W.2d 903 (1993) ("The rules of practice and procedure include the rules of evidence."); Opinion of the Justices (Prior Sexual Assault Evidence), 141 N.H. 562, 577, 688 A.2d 1006 (1997) ("A court's constitutional function to independently decide

controversies is impaired if it must depend on, or is limited by, another branch of government in determining and evaluating the facts of the controversies it must adjudicate."); State v. Herrera, 92 N.M. 7, 12, 582 P.2d 384 (N.M. Ct. App. 1978) (statute regulating admission of victim's past sexual conduct "goes to practice and procedure and, thus, pertains to matters within the control of the Supreme Court"); Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 310 (N.M. 1976) ("[R]ules of evidence are procedural, in that they are a part of the judicial machinery administered by the courts for determining the facts upon which the substantive rights of the litigant rest and are resolved."); State v. Mallard, 40 S.W.3d 473 (Tenn. 2001) (statute governing admission of evidence of defendant's prior convictions subject to evaluation under separation of powers doctrine); Teter, 190 W.Va. 711, 724-26 (statute precluding expert real estate appraiser from testifying in court unless appraiser was licensed under the act, conflicted with ER 702 and therefore violated separation of powers doctrine).

c. RCW 10.58.090 conflicts with a court rule of evidence and therefore violates the separation of powers doctrine.

As stated, RCW 10.58.090 permits the court to admit, in a criminal action in which the defendant is accused of a sex offense,

"evidence of the defendant's commission of another sex offense or sex offenses . . . notwithstanding Evidence Rule 404(b)." The statute permits courts to admit evidence of prior offenses for *any* purpose, including for the purpose of proving the defendant's propensity to commit the crime, which ER 404(b) categorically forbids.⁶ The statute therefore conflicts with a court procedural rule and violates the separation of powers doctrine.

Unlike the child hearsay statute examined in State v. Ryan, 103 Wn.2d 165, statutes permitting propensity evidence cannot be harmonized with the Evidence Rules. As discussed above, ER 802 provides that *hearsay* evidence may be admissible pursuant to statute, notwithstanding the Evidence Rules. But no such exception exists for propensity evidence. Although ER 402 provides that "[a]ll relevant evidence is admissible, except as . . . otherwise provided by statute," that rule permits the Legislature only to *bar* otherwise relevant evidence. 5 Karl B. Tegland, Washington Practice Series: Evidence Law and Practice, § 402.2,

⁶ ER 404(b) provides:

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

at 275 (5th ed. 2007). It does not permit the Legislature to *allow* admission of evidence that the Evidence Rules prohibit.

Although the statute requires courts to weigh the probative value of the prior offense evidence against the danger of unfair prejudice, using the analysis provided in ER 403, see RCW 10.58.090(1), (6)(g), the statute usurps the court's constitutional authority to ban propensity evidence outright. ER 404(b) reflects the judiciary's long-standing judgment that the relevance of propensity evidence is simply too attenuated, and its potential for prejudice too great, to be allowed in any prosecution. Indeed, the ban on propensity evidence has been firmly and historically established in the common law since at least the seventeenth century in England and, as evidenced in case law and state and federal codes of evidence, has had continuing validity to the present. Louis M. Natali, Jr. & R. Stephen Stigall, Are You Going to Arraign His Whole Life? How Sexual Propensity Evidence Violates the Due Process Clause, 28 Loy. U. Chi. L.J. 1, 14 (1996); 1A John H. Wigmore, Wigmore on Evidence, § 58.2, at 1213 (noting ban on propensity evidence received judicial sanction for three centuries).

The common law in Washington has been consistent with the tradition elsewhere. ER 404(b) reflects the traditional common

law rule that a person's prior crimes, wrongs, or acts are inadmissible to demonstrate the person's character or general propensities. 5 Tegland, Washington Practice, *supra*, § 404.9, at 497. Historically, evidence of past sexual misconduct has been admissible in Washington only to show the defendant's "lustful disposition" *toward the complainant*. See, e.g., State v. Crowder, 119 Wash. 450, 451-52, 205 P. 850 (1922) (allowing admission of evidence of prior acts of sexual intercourse *between the parties* to show lustful disposition of defendant). The judiciary in Washington has consistently affirmed its allegiance to ER 404(b)'s general ban on sexual misconduct propensity evidence. See, e.g., State v. Sutherby, 165 Wn.2d 870, 886, 204 P.3d 916 (2009) (explaining that pornography evidence is admissible only to show sexual desire for particular victim; otherwise, such evidence "would merely show Sutherby's predisposition toward molesting children and is subject to exclusion under ER 404(b)").

In its statement of purpose, the Legislature asserted it had authority to enact RCW 10.58.090 as part of its authority to enact "rules as substantive law." Laws 2008, ch. 90, § 1, Statement of Purpose. The Legislature explained:

Purpose--Exception to Evidence Rule--2008
c 90: In Washington, the legislature and the courts

share the responsibility for enacting rules of evidence. The court's authority for enacting rules of evidence arises from a statutory delegation of that responsibility to the court and from Article IV, section 1 of the state Constitution. (citing State v. Fields, 85 Wn.2d 126, 129, 530 P.2d 284 (1975)).

The legislature's authority for enacting rules of evidence arises from the Washington supreme court's prior classification of such rules as substantive law. (citing State v. Sears, 4 Wn.2d 200, 215, 103 P.2d 337 (1940) (the legislature has the power to enact laws which create rules of evidence); State v. Pavelich, 153 Wash. 379, 279 P. 1102 (1929) ("rules of evidence are substantive law").

The legislature adopts this exception to Evidence Rule 404(b) to ensure that juries receive the necessary evidence to reach a just and fair verdict.

Id.

But as discussed above, Washington courts consistently characterize rules of evidence as rules of procedure subject to the judiciary's ultimate authority. In criminal cases, rules of evidence are central to the courts' core purpose to regulate the manner in which the fact-finder decides guilt or innocence.

The cases cited by the Legislature in its statement of purpose are not inconsistent with the Supreme Court's characterization of rules of evidence as subject to its sole authority. In State v. Sears, 4 Wn.2d at 215, the court merely recognized that the legislature may create rules of evidence. The Legislature's authority to enact statutory rules of evidence is not in doubt. But

under the separation of powers doctrine, evidence statutes must give way to court rules when they directly conflict.

Similarly, in State v. Pavelich, 153 Wn.2d 379, the court did not hold that the Legislature may enact evidence statutes that conflict with court rules. The issue in Pavelich was whether a court rule that abolished a trial court's mandatory duty to inform the jury that it could draw no inference of guilt from the accused's failure to testify, was an unconstitutional usurpation of legislative authority. Id. at 385-86. The court stated in dicta that "[r]ules of evidence constitute substantive law, and cannot be governed by rules of court," Id. at 382, but the court did not explain the statement and it was not necessary to its decision. Moreover, the statement is inconsistent with the case law discussed above.

As discussed more fully in the sections below, rules of evidence may be characterized as "substantive" if they change "the amount of evidence necessary to support a conviction." E.g., Ludvigsen v. City of Seattle, 162 Wn.2d 660, 671, 174 P.3d 43 (2007). Such rules may not be applied retroactively, however, without violating the Ex Post Facto Clause. Id.

In Brim v. State, 624 N.E.2d 27, 33 n.2 (Ind. Ct. App. 1993) and State v. Day, 643 N.E.2d 1 (Ind. Ct. App. 1995), the Indiana

Court of Appeals struck down a statute similar to RCW 10.58.090⁷ because it conflicted with the common law and the evidence rules.

Similarly, RCW 10.58.090 directly conflicts with a court rule and therefore violates the constitutional separation of powers doctrine. The statute is void. State v. Thorne, 129 Wn.2d 736, 762, 921 P.2d 514 (1996) (legislation that violates separation of powers doctrine is void).

2. THE APPLICATION OF RCW 10.58.090 IN THIS CASE VIOLATES THE EX POST FACTO CLAUSE OF THE FEDERAL CONSTITUTION

RCW 10.58.090 allows the State to rely upon highly incriminating evidence of a defendant's past sexual misconduct, which would otherwise be inadmissible, in order to convict him of a current sexual offense. The Legislature's intent in enacting the statute was to supply a deficiency of legal proof common in sex offense prosecutions. Moreover, the statute permits courts to consider, in deciding whether to admit the prior offense evidence, the "necessity" for the evidence in light of the State's other evidence already admitted. RCW 10.58.090(6)(e). In these ways, the statute effectively alters the standard of proof required to convict a person of a sex offense.

⁷ The Indiana statute permitted, in a prosecution for child molestation, the admission of evidence of the defendant's prior sexual molestation of a different

Because the statute is a substantive rule of evidence that alters the standard of proof required to convict a person of a class of crime, its application in this case violates the Ex Post Facto Clause of the federal constitution.

a. The federal Ex Post Facto Clause prohibits retroactive application of statutes that alter the rules of evidence in order to supply a deficiency of legal proof in criminal prosecutions.

Article 1, section 10 of the United States Constitution provides, "No State shall . . . pass any Bill of Attainder, ex post facto law, or Law impairing the Obligation of Contracts."

The test for determining whether a statutory enactment may be applied in a prosecution for conduct that occurred before its enactment, is set forth in Calder v. Bull, 3 U.S. 386, 1 L.Ed. 648 (1798). Ludvigsen v. Seattle, 162 Wn.2d 660, 668, 174 P.3d 43 (2007). Ex post facto laws fall into four categories:

1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence,

victim. Ind. Code 35-37-4-15 (cited in Brim, 624 N.E.2d at 33 n.2).

in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive.

Calder, 3 U.S. at 390-91.

The fourth Calder category, prohibiting the retroactive application of laws that alter the legal rules of evidence, is at issue in this case. Only laws that "change the rules of evidence, for the purpose of conviction," fall within the category. Id. at 391. The ex post facto prohibition against such laws arose in opposition to the British practice of, among other things, enacting laws that "violated the rules of evidence," in order "to supply a deficiency of legal proof" in criminal prosecutions. Id. at 389.

In determining whether an alteration in an evidence statute may be applied to conduct pre-dating its enactment, the question is whether the alteration is characterized as "procedural" or "substantive." Ludvigsen, 162 Wn.2d at 671. "If it is characterized as a procedural change in the admissibility of evidence, it does not violate the ex post facto clause. If it is characterized as a substantive change in the amount of evidence necessary to support a conviction, then it violates the ex post facto clause." Id. The difference between "ordinary" rules of evidence, which are procedural, and those addressed by the Ex Post Facto Clause, "is their impact on the sufficiency of evidence necessary to convict."

Id. "[O]rdinary' rules of evidence do not implicate ex post facto concerns because 'they do not concern whether the admissible evidence is sufficient to overcome the presumption [of innocence].'"

Id. (quoting Carmell v. Texas, 529 U.S. 513, 533 n.23, 120 S.Ct. 1620, 146 L.Ed.2d 577 (1999)). In contrast, "substantive" rules "reduc[e] the quantum of evidence required to convict an offender." Carmell, 529 U.S. at 532-33. Such rules are unfair because, in each instance, the government has altered the rules after the fact "in a way that is advantageous only to the State, to facilitate an easier conviction." Id.

In Ludvigsen, the court examined a change in the law of evidence regarding the crime of driving under the influence (DUI). 162 Wn.2d 660. Before the change, in order to prove the crime under the "per se" prong of the DUI ordinance, the City was required to prove the blood alcohol test machine's thermometer was certified; after the change, the City no longer had to prove the thermometer was certified. Id. at 663, 666. The court concluded the change in the law was "substantive," because it "disadvantage[d] the defendant by permitting a conviction based on less evidence than was previously required." Id. at 672. The change in law was not merely procedural, as the amendments "d[id]

not simply let more evidence in to trial; they change[d] the quantum of evidence necessary to support a conviction." Id. at 674.

By contrast, in State v. Clevenger, 69 Wn.2d 136, 417 P.2d 626 (1966), the court addressed a "procedural" change in a rule of evidence that did not raise ex post facto concerns. In Clevenger, after the crime occurred but before trial, the Legislature amended the marital privilege statute to permit one spouse to testify against another in a criminal action for a crime committed by the spouse against his or her child. Id. at 140-41. The statute was "procedural" because it did not "authorize conviction upon less proof, in amount or degree, than was required when the offense was committed." Id. at 142 (quoting Hopt v. People of Territory of Utah, 110 U.S. 574, 589, 4 S.Ct. 202, 28 L.Ed. 262 (1884)). Instead, the law "only remove[d] existing restrictions upon the competency of certain classes of persons as witnesses." Id. at 142 (quoting Hopt, 110 U.S. at 589).

Similarly, in Thompson v. Missouri, 171 U.S. 380, 387-88, 18 S.Ct. 922, 43 L.Ed. 204 (1898), the United States Supreme Court concluded that a procedural change permitting the court to admit letters written by the defendant to his wife for the purposes of

comparing them to letters admitted into evidence was not an ex post facto violation because the change in law

did nothing more than remove an obstacle arising out of a rule of evidence that withdrew from the consideration of the jury testimony which, in the opinion of the legislature, tended to elucidate the ultimate, essential fact to be established, namely, the guilt of the accused. Nor did it give the prosecution any right that was denied to the accused. It placed the state and the accused upon an equality.

Yet, any simple distinction between rules affecting admissibility or competency of evidence and rules affecting the amount or degree of proof required for conviction "neglect[] the practical relationship between rules of admissibility and standards of proof." 1 John H. Wigmore, Evidence in Trials at Common Law, § 7, at 468 n.4 (Tillers rev. ed. 1983). Such distinctions can be unhelpful, because the standard of proof is effectively altered in a class of cases by any rule, specifically directed at criminal defendants, that allows admission of prejudicial evidence for the purpose of supply a deficiency of legal proof. When the Legislature alters the rules of evidence in order to supply a deficiency of legal proof, application of the new statute to crimes pre-dating its enactment is oppressive in the manner the Ex Post Facto Clause was meant to address. See Calder, 3 U.S. at 389.

In sum, a statute that alters the rules of evidence for the purpose of supplying a deficiency of legal proof for a class of crime, in order to convict offenders, may not be applied to crimes pre-dating its enactment. Calder, 3 U.S. at 389, 390-91. Such a statute effectively alters the State's burden of proof.

b. Application of the statute in this case violates the federal Ex Post Facto Clause. It is plain that the Legislature enacted RCW 10.58.090 in order to make convictions for sex offenses more easy. The Legislature adopted the provision "to ensure that juries receive the necessary evidence to reach a just and fair verdict." Laws 2008, ch. 90, § 2, Statement of Purpose. But unlike the evidence rule at issue in Clevenger, 69 Wn.2d 136, and Thompson, 171 U.S. 380, the provision does not place "the state and the accused upon an equality." Thompson, 171 U.S. at 387-88. To the contrary, the purpose and effect of the statute is to overcome deficiencies of proof common to sex offense prosecutions and make conviction more easy.

The statute directs courts to consider "the necessity of the evidence beyond the testimonies already offered at trial." RCW 10.58.090(6)(e). The purpose of this provision, and the statute as a whole, is to facilitate sex abuse convictions, which previously often

depended upon the victim's testimony alone. Testimony in favor of the bill in the House Report states: "We need to allow for admission of [prior sex offense] evidence that did not result in a conviction because the nature of these offenses often result in no charge being filed and no convictions." H.R. B. Rep., 2008 Reg. Sess. S.B. 6933. Testimony at the Senate Hearing states: "ER 404(b) should be changed as it applies to trials of sex offenses," because juries in such cases too often are unable to reach a verdict. S.B. Rep., 2008 Reg. Sess. S.B. 6933.

Applying RCW 10.58.090(6)(e), the trial court in this case found that the evidence of Mr. Gresham's prior sex offenses was "necessary" to the State's case due to the lack of other evidence:

In this case, there will be testimony offered by J.L., a young woman, regarding incidents of some five to nine years ago. There is no physical or scientific or medical or, quite frankly, any other evidence supporting her testimony. In addition, for years and years and years children have been abused and, for years and years and years, people have just not wanted to confront or face that. Again, our legal system favors accountability and responsibility. The purpose behind the enactment of RCW 10.58.090 is to ensure that juries receive the evidence necessary to reach a just and fair verdict. The evidence of the prior bad acts is a tool by which this jury can decide whether or not in fact the instant abuse occurred making the admission of this particular bad act evidence necessary. In the words of the judge in the

DeVincentis^[8] case, evidence of the prior acts is the only form of evidence that could corroborate testimony of the current victim. I conclude that that makes the evidence necessary to help the jury decide, not that the defendant is a bad man, but whether or not he engaged in the acts of misconduct currently alleged.

CP 13-14.

In sum, the statute as intended by the Legislature and as applied by the trial court in this case, effectively alters the degree of proof the State must present to obtain a conviction for a sex offense. The Legislature's statement of purpose reflects its understanding that this is indeed a "substantive law." Laws 2008, ch. 90, § 2, Statement of Purpose. For these reasons, application of the law in Mr. Gresham's case violated the federal Ex Post Facto Clause.

3. THE APPLICATION OF RCW 10.58.090 IN THIS CASE VIOLATES THE EX POST FACTO CLAUSE OF THE WASHINGTON CONSTITUTION

RCW 10.58.090 plainly alters the rules of evidence for the purpose of convicting a person charged with a sex offense. The statute therefore falls under the fourth category of ex post facto laws set forth in Calder, 3 U.S. at 390-91 ("Every law that alters the legal rules of evidence, and receives less, or different, testimony,

⁸ State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003).

than the law required at the time of the commission of the offence, in order to convict the offender."). A Gunwall⁹ analysis reveals the Founders of the Washington Constitution would have understood that the state ex post facto clause applied to laws falling under the fourth Calder category. Therefore, the Founders would have intended that application of RCW 10.58.090 to Mr. Gresham's case was in violation of article 1, section 23.

a. Gunwall analysis.

i. Factors one and two—textual language of the Washington Constitution and significant differences between the state and federal Ex Post Facto Clauses. Article 1, section 10 of the United States Constitution provides, "No State shall . . . pass any Bill of Attainder, ex post facto law, or Law impairing the Obligation of Contracts." The Washington Constitution ex post facto prohibition provides: "[n]o bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed." Const. art. 1, § 23. Although the language of the two provisions is

⁹ The six non-exclusive Gunwall factors are: (1) the textual language of the state constitution; (2) significant differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in structure between the federal and state constitutions; and (6) matters of particular state interest or local concern. State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986).

similar, use of the word "ever" in the state provision suggests an emphatic intent by the Founders to forbid ex post facto laws.

ii. Pre-existing state law. Very few cases addressing the ex post facto prohibition pre-date the adoption of the Washington Constitution. In Fox v. Territory, 2 Wash. Terr. 297, 300, 5 P. 603 (1884), the Washington Supreme Court held a law that prescribed qualifications for persons proposing to practice medicine in the territory and that excluded many from the practice who might otherwise engage in it, was not ex post facto under the federal constitution, because it "[did] not proceed upon the idea of punishment for past acts." The court explained that ex post facto laws prohibited by the federal constitution include those that are "directed at particular classes, prescribing additional penalties for acts before that declared crimes, rendering punishable acts not before criminal, and changing the rules of evidence by which less or different testimony was made sufficient to convict." Id. at 300.

iii. History of constitutional provision. The delegates at the Washington constitutional convention borrowed the language in Section 23 from the California and Oregon Constitutions, the Hill draft, and the federal Constitution. Robert F. Utter and Hugh D. Spitzer, The Washington State Constitution: A

Reference Guide 37-38 (2002). The language of the Washington provision is identical to the Oregon provision. State v. Fugate, 223 Or. 195, 210 n.5, 26 P.3d 802 (2001) (article 1, section 21, of the Oregon Constitution provides, "No *ex post facto* law . . . shall ever be passed"). The Oregon provision, in turn, was derived from the Indiana Constitution. Id. at 211.

Washington's Constitution reflects the political ideals of the Progressive Era and their influence on western state politics of the period. Cornell W. Clayton, Toward a Theory of the Washington Constitution, 37 Gonz. L. Rev. 41, 67-68 (2001/2002). The historical milieu and political culture in Washington at the time included the aim to secure a popular, democratic government against corruption and special corporate privilege, while simultaneously protecting individual rights, which included traditional legislative prohibitions on bills of attainder and *ex post facto* laws. Id.

iv. Differences in structure between the federal and state constitutions. The United States Constitution is a grant of limited power to the federal government, whereas the Washington Constitution imposes limitations on the otherwise plenary power of the state. Gunwall, 106 Wn.2d at 61. This means that, at the state

level, protection from legislative power is found solely in positive constitutional affirmations of individual liberties. Clayton, Toward a Theory of the Washington Constitution, *supra*, at 74.

v. Matters of particular state interest. The regulation of criminal trials is a matter of particular state concern. State v. Boland, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990); Gunwall, 106 Wn.2d at 62.

vi. Common law history. Early decisions from the Washington Supreme Court indicate the court understood that laws altering the rules of evidence to make conviction more easy could not be applied to crimes pre-dating their enactment. Lybarger v. State, 2 Wash. 552, 560-61, 27 P. 449 (1891). In Lybarger, the court addressed whether the state constitutional provision allowing prosecution by information rather than presentment to grand jury was ex post facto as applied to crimes occurring before the constitution was adopted. *Id.* at 555. The court applied the four factors set forth in Calder, 3 U.S. at 390-01, and held the change in law at issue in Lybarger was merely "procedural" and did not fall under any of the factors. 2 Wash. at 557. The court explained it understood the fourth Calder factor to

bar "change[s in] the rules of evidence to make conviction more easy." Id. at 560-61.

The Washington Supreme Court's early understanding of the fourth Calder category parallels the early understanding of the Oregon and Indiana courts. State v. Fugate, 332 Or. 195, 26 P.3d 802 (Or. 2001). Again, article 1, section 23 of the Washington Constitution is derived from the identical provision in the Oregon Constitution, which, in turn, is derived from the Indiana Constitution. Id. at 211. In Fugate, the Oregon court noted that the Indiana Supreme Court had construed the meaning of its ex post facto clause as prohibiting the application of laws that "'retrench the rules of evidence, so as to make conviction more easy.'" Id. (quoting Strong v. State, 1 Blackf. 193, 196 (Ind. 1822)). The Indiana court had cited to Calder v. Bull, 3 U.S. 386. Fugate, 332 Or. at 211 (citing Strong, 1 Blackf. at *2 n.2). The Oregon court observed that the Indiana court's decision in Strong would have been available to the Oregon framers when they decided to adopt the ex post facto provision of the state constitution. Fugate, 323 Or. at 212, 213 n.6. Thus, the Oregon Constitution forbids the retroactive application of laws that fall within the fourth Calder category. Id. at 213. In other words, "laws that alter the rules of evidence in a one-sided way that

makes conviction of a defendant more likely," may not be applied to crimes committed before their enactment. Id.

In Fugate, the Oregon court independently applied its state constitutional provision to a statutory amendment that barred the exclusion of evidence obtained in violation of statute unless exclusion was otherwise required by law. Id. at 198-99. The acknowledged purpose of the Oregon law was to make criminal convictions easier. Id. at 214-15. Applying the fourth Calder category, the court held the provision violated the ex post facto clause of the Oregon Constitution because it operated retroactively and to the exclusive benefit of the prosecution. Id.

b. RCW 10.58.090 violates the Ex Post Facto Clause of the Washington Constitution as applied in this case. RCW 10.58.090 plainly alters the rules of evidence, permitting different evidence than was earlier allowed, in order to make conviction in a sex offense prosecution more likely. In Calder v. Bull, 3 U.S. at 390-91, the United States Supreme Court explained: "Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender" is ex post facto when applied to crimes occurring before its enactment. At the time of the

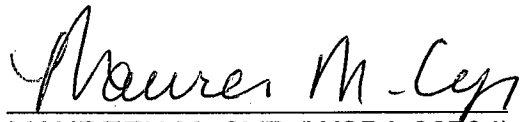
founding of the Washington Constitution, courts applied the Calder framework. Lybarger, 2 Wash. at 557; Fugate, 323 Or. at 212-13. Thus, the founders of the Washington Constitution would have understood that, "laws that alter the rules of evidence in a one-sided way that make conviction of a defendant more likely," may not be applied to crimes pre-dating their enactment. Fugate, 323 Or. at 213.

In light of these considerations, this Court must conclude that RCW 10.58.090, as applied to Mr. Gresham's case, violates article 1, section 23 of the Washington Constitution.

F. CONCLUSION

Because RCW 10.58.090 directly conflicts with a court rule, it violates the separation of powers doctrine and is void. Alternatively, the statute is a substantive rule of evidence that violates the Ex Post Facto Clauses of the state and federal constitutions as applied in this case.

Respectfully submitted this 14th day of July 2009.

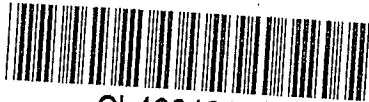

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APPENDIX A

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CL13318675

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

STATE OF WASHINGTON,

Plaintiff,

vs.

MICHAEL T. GRESHAM,

Defendant.

08-1-00795-7

FINDINGS OF FACT AND
CONCLUSIONS OF LAW REGARDING
ADMISSIBILITY OF EVIDENCE OF
PRIOR SEXUAL MISCONDUCT

This matter came before the court on October 21, 2008 and October 28, 2008, on the State's motion to admit evidence of prior sexual misconduct by the defendant pursuant to ER 404(b) and RCW 10.58.090. The court considered the records and files herein, including the affidavit of probable cause; the argument of counsel and; the State's Offer of Proof and attachments thereto, including: (1) Copies of City of Renton Police reports for Case Number 97-7935; (2) The Affidavit of Probable Cause for King County Cause #97-1-09573-1 KNT; (3) The Motion and Order Determining The Existence of Probable Cause, Directing Issuance of Warrant And Fixing Bail for King County Cause #97-1-09573-1 KNT; (4) The Amended Information in King County Cause #97-1-09573-1 KNT; (5) the Statement of Defendant on Plea of Guilty in King County Cause #97-1-09573-1 KNT; (6) The Judgment and Sentence in King County

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1 Cause #97-1-09573-1 KNT; (7) The Presentence Investigation in King County Cause
2 #97-1-09573-1; (8) The Transcript of the Interview Detective Richardson conducted of
3 J.L. (current victim) on March 7, 2007; and (9) the recordings of the interviews of A.C.
4 (prior victim in King County Cause #97-1-09573-1 KNT); J.L., Marcy Lee and James
5 Lee conducted by the defense in the present case. Being fully advised, the court now
6 makes the following findings of fact and conclusions of law.

7 **1. Findings of Fact.**

8 1.1 When J.L. (DOB 9/6/1990) was 16 years old, she told a drug and alcohol
9 evaluator that she had been molested by the defendant, Michael Gresham, on multiple
10 occasions between the ages of 8 and 12. The evaluator contacted CPS who notified
11 the Edmonds Police Department.

12 1.2 Edmonds Police Detective Richardson contacted J.L.'s mother, Marcy,
13 who reported that the defendant was married to Marcy's best friend, Leslie. The
14 defendant and Leslie had been together since approximately 1994 or 1995. Leslie
15 spent a lot of time with J.L., babysitting when needed. J.L. spent the night at Leslie and
16 the defendant's home with some frequency over the years. When J.L. was 12, J.L. told
17 her that the defendant, Michael Gresham, had touched her inappropriately when J.L.
18 spent the night at his house. Marcy and her husband decided that they would keep J.L.
19 away from the defendant, but left the decision about whether to report the crime to J.L.
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22 1.3 A few weeks after telling her parents about the abuse, J.L. was diagnosed
23 with diabetes and no report was made to the police.
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2 1.4 On March 7, 2007, J.L. was interviewed by Edmonds Police Officer
3 Kinney. J.L. reported that she spent time at the defendant's home 1-3 times a month up
4 until the time she told her parents about what he had been doing, when she was 12
5 years old. During this time the defendant lived in Edmonds, Washington. The first time
6 J.L. remembers the defendant touching her inappropriately was right after he got out of
7 jail when J.L. was 7 or 8. J. L. did not know what he was in jail for until after she told
8 her parents about what the defendant had been doing to her. J.L. spent the night at the
9 defendant's house and was sleeping in a bed with the defendant's daughter, K.G., who
10 is approximately 5 years younger than J.L. J.L. heard the door open and pretended like
11 she was asleep. The defendant came in and sat on the end of the bed and rubbed
12 J.L.'s leg. He then lifted up the covers and tried to get under, but J.L. rolled over so
13 there wasn't room for him to lie down.
14

15 J.L. described another incident when she was spending the night at the
16 defendant's Edmonds home. J.L. thought she was 10 or 11. She was again sleeping
17 with K.G. and woke up to feel someone touching her "private parts" (which she later
18 clarified was her "vagina") over her underwear. She looked and found that it was the
19 defendant. The defendant was looking down, not looking at her. The defendant was at
20 the foot of the bed, with his hand underneath the covers touching and rubbing her
21 vagina over her underwear. J.L. sat up and the defendant stopped. J.L. recalled the
22 defendant saying something like "you guys need to go to sleep" and then leaving the
23 room.
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1 J.L. said that over the next couple of years, this same thing happened 8-10
2 times. The defendant would always rub and touch J.L.'s "vagina" over her underwear,
3 with his hand, at night, when he thought she was sleeping. J.L. would either be
4 sleeping on the couch or in K.G.'s bed when it happened. It happened during the years
5 that J.L. was 8, 9, 10, 11 and 12.

6 1.5 Prior to meeting Leslie, the defendant dated a woman named Jodi Stack,
7 who lived in Renton, Washington.

8 1.6 Jodi Stack had a niece, A.C. (DOB 6/14/1983).

9 1.7 According to A.C., in January or February of 1993, when A.C. was 9
10 years old, she spent the night at Jodi and the defendant's home. A.C. was asleep in a
11 bedroom by herself when she awoke to find the defendant laying on his side facing her.
12 A.C. did not look, but said it felt like the defendant was naked. The defendant put his
13 hand underneath A.C.'s underwear and pajamas and rubbed her vagina, putting his
14 fingers inside her vagina. A.C. said she did not say anything and pretended she was
15 asleep. A.C. did not tell anyone about this incident for quite some time.

16 Around Easter of 1993, A.C. went to spend the night at Jodi and the defendant's
17 home again. Again, A.C. went to bed in a bedroom by herself. Some time later, A.C.
18 heard the defendant come into the room and get into her bed. The defendant again put
19 his hand inside A.C.'s underwear and his fingers inside her vagina. A.C. again
20 pretended to be asleep. The defendant stayed in A.C.'s bed until the alarm went off.
21 A.C. pretended she had just awakened and discovered the defendant. A.C. asked the
22 defendant what he was doing. The defendant told A.C. he was just lying down with her.
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1 A.C. told Jodi about this that morning, but Jodi and A.C. did not report it to the police or
2 to A.C.'s parents.

3 It wasn't until 1997 that A.C.'s parents found out and reported the abuse to
4 police. A.C. was then 14 and did not want to go through a trial. A.C. did provide a
5 statement to police. According to A.C. the two times that the defendant sexually abused
6 her are the only two times that she remembers spending the night at the defendant's
7 residence.

8
9 1.8 On December 29, 1997, the defendant was charged, in King County, with
10 one count of Rape of a Child in the First Degree for his assault of A.C.

11 1.9 On October 30, 1998, the defendant pled guilty, by way of Alford plea, to
12 Second Degree Assault With Sexual Motivation. The charge to which he pled guilty
13 stated that in King County, Washington between January 1, 1993 and December 28,
14 1993, with intent to commit the felony of Rape of a Child, the defendant intentionally
15 assaulted A.C. In his plea, the defendant stated that, if he went to trial, in all likelihood
16 he would be found guilty of the offense charged.

17
18 1.10 The defendant was released from jail on the Second Degree Assault With
19 Sexual Motivation charge in December 1998.

20 1.11 In December 1998, J.L. was 8 years old.

21 1.12 Both of J.L.'s parents confirmed that J.L. knew nothing about the
22 defendant's prior sex crime prior to J.L. telling them about what he'd done to her. All
23 J.L. knew before then was that the defendant had been in jail. J.L.'s parents knew very
24 little about A.C.'s allegation and were led to believe that it wasn't true.
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1.13 The court finds, by a preponderance of the evidence, that the acts A.C. alleges the defendant committed against her when she was approximately 9 years of age (as discussed above) did occur.

1.14 The court finds a remarkable similarity between the defendant's acts against A.C. and the defendant's acts against J.L. In A.C.'s situation, in January or February of 1993, she was about nine years old. In J.L.'s situation, beginning in December 1998, she was eight years old and was apparently subjected to this abuse for about four years, until she was roughly 12. Both were young girls; both of them stayed overnight at the defendant's residence or the residence where the defendant was staying with either his family or significant other; both of them were molested by hands or fingers. There was no penile, oral or other sort of contact with either A.C. or J.L. Most of the abuse of both girls happened at a time when they were sleeping in a bedroom separate and apart from the sleeping quarters of the defendant. It is reported in both cases that the defendant came into the girls' sleeping quarters and engaged in molestation during the night. No weapon was ever used on anybody.

2. Conclusions of Law

2.a. Evidence Rule 404(b), does not support admission of the prior misconduct against A.C. because there is an absence of evidence upon which the court can conclude that these individual molestations were part of a common scheme or plan. The State's request to admit evidence of the defendant's abuse of A.C. under ER 404(b) is denied.

The requirements for admission of prior bad acts under ER 404(b) are four in number and are analyzed individually below.

1 **2.a(1) The State has shown, by a preponderance of the evidence, that the**
2 **prior act occurred.** The court finds that the evidence provided, including A.C.'s
3 statement made to defense attorney Donald Wackerman, the City of Renton Police
4 Reports, and the King County Superior Court documents, prove, by a preponderance of
5 the evidence, that the prior acts proffered in the offer of proof by the State and detailed
6 in the various documents and materials, did occur. This element supports admission of
7 the evidence under ER 404(b).
8

9 **2.a(2) The proffered evidence or testimony is relevant to prove an element**
10 **of the crime charged or to rebut a defense in the instant case.** The instant case
11 alleges a variety of child molestation charges where J.L. is the victim. Of extreme
12 importance is evidence that would support or undermine J.L.'s credibility. The prior
13 sexual misconduct of the defendant against A.C. is relevant, as it has a tendency to
14 prove or disprove the charges brought in the instant case. The court finds that this
15 element supports admission of those prior bad acts.
16

17 **2.a(3) The proffered evidence is more probative than prejudicial.** The idea
18 behind our criminal justice system is accountability, personal responsibility, honesty and
19 integrity. Child sexual abuse cases are not easily presented or easily decided. In many
20 cases, there is no physical evidence. Many times the touching leaves no fingerprints
21 and no other form of physical evidence or injury. It leaves nothing except the word of a
22 child who, when she or he brings forth an allegation of sexual misconduct, has, over the
23 years, been met with automatic discounting; and the child-versus-adult knee jerk
24 reaction is that it probably didn't happen, because the victim is only a child. Additional
25 evidence by prior bad acts is the only corroborating evidence that some of these cases
26

1 have. The value of the prior bad acts under 404(b) is that it is the only evidence
2 corroborating what the victim says. The danger that is presented to the defendant,
3 which certainly can be present, can be remedied by limiting instructions specifically and
4 clearly defining for the jury that this evidence is not to be used as any sort of litmus
5 paper test about the character of the defendant, nor should they consider it as evidence
6 that he is a bad person and therefore must have committed the offense, but simply
7 considered as some evidence to determine whether or not the instant offenses
8 occurred. This element supports the admission of the prior bad acts under 404(b).
9

10 **2.a(4) The State has not shown that the defendants acts against A.C. and**
11 **J.L. were part of a common scheme or plan.** To prove common scheme or plan, the
12 law requires, more than similarity in the defendant's actions or the results of his actions,
13 it requires a common scheme or plan. The idea behind common scheme or plan is that
14 the individual acts are simply manifestations of an ongoing plan, scheme or method of
15 operation that is far more inclusive than simply a variety of separate independent acts.
16

17 While the court finds that there is a similarity in the defendant's actions on these
18 particular occasions, there isn't evidence that the defendant engaged in some conduct
19 or planning *before* the actual commission of the crimes that establishes a common
20 scheme or plan. Thus, the State has failed to prove that the evidence should be
21 admitted as part of a common scheme or plan under ER 404(b).
22

23 **2.b Evidence of the defendant's prior acts against A.C. are admissible in**
24 **the State's case in chief under RCW 10.58.090.**

25 In enacting RCW 10.58.090, the legislature has shown that child abuse is finally
26 being acknowledged by our society. The statute talks about and mentions Evidence

1 Rule 404(b), which generally was limited in its application to either a unique method of
2 operation or common scheme or plan. The statute begins, "In a criminal action in which
3 the defendant is accused of a sex offense, evidence of the defendant's commission of
4 another sex offense or sex offenses is admissible." Specifically, it says,
5 "Notwithstanding Evidence Rule 404(b)". The statute says that the legislature adopts
6 this *exception* to Evidence Rule 404(b), to ensure that juries receive the necessary
7 evidence to reach a just and fair verdict.
8

9 The criminal justice system is interested in reaching just and fair verdicts, holding
10 people accountable for what they do and allowing them freedom when they have not
11 committed any wrongs. So with that background, the Court must consider eight factors
12 in evaluating whether the evidence of the defendant's commission of another sexual
13 offense or offenses should be excluded or admitted.
14

15 **2.b(1) The prior acts probably occurred.** As discussed above, the prior acts of
16 sexual misconduct against A.C. did, in all probability, occur. This factor favors
17 admissibility.
18

19 **2.b(2) Similarity.** As discussed above, the actions of the defendant with A.C.
20 and the actions of the defendant with J.L. were remarkably similar. This factor favors
21 admitting the prior acts of sexual misconduct under the statute.
22

23 **2.b(3) Closeness in time.** The act charged here was from December 1998 on
24 for a period of about four years. The prior acts were in January and April of 1993. While
25 that is a 5-year difference, Courts have admitted prior acts of sexual misconduct for up
26 to 11, 15, and 30 years. The five year difference in this case leans toward the admission
of the prior acts because there is a sufficient closeness in time.

1 **2.b(4) The frequency of the prior bad acts.** The evidence shows that in
2 January or February of 1993 and again in April of 1993, the acts were committed
3 against A.C. They were committed on the only two occasions when A.C. was
4 vulnerable to the defendant. The acts against J.L. were more frequent but, considering
5 that according to A.C., they happened on the only two times that she was available for
6 the defendant to have done those acts, they are frequent enough to support their
7 admission under the statute. This factor weighs in favor of admissibility.
8

9 **2.b(5) Presence or lack of intervening circumstances.** The court is not aware
10 of any intervening circumstances that would indicate that the prior acts should not be
11 considered by the jury as evidence in this case. This factor weighs in favor of
12 admissibility.
13

14 **2.b(6) Necessity of the evidence.** In this case, there will be testimony offered
15 by J.L., a young woman, regarding incidents of some five to nine years ago. There is
16 no physical or scientific or medical or, quite frankly, any other evidence supporting her
17 testimony. In addition, for years and years and years children have been abused and,
18 for years and years and years, people have just not wanted to confront or face that.
19 Again, our legal system favors accountability and responsibility. The purpose behind
20 the enactment of RCW 10.58.090 is to ensure that juries receive the evidence
21 necessary to reach a just and fair verdict. The evidence of the prior bad acts is a tool by
22 which this jury can decide whether or not in fact the instant abuse occurred making the
23 admission of this particular prior bad act evidence necessary. In the words of the judge
24 in the DeVincentis case, evidence of the prior acts is the only form of evidence that
25 could corroborate testimony of the current victim. I conclude that that makes the
26

1 evidence necessary to help the jury decide, not that the defendant is a bad man, but
2 whether or not he engaged in the acts of misconduct currently alleged.

3 **2.b(7) Whether the prior act was a criminal conviction.** The defendant was
4 charged with Rape of a Child in the First Degree in King County. It is no secret that
5 negotiations are had where charges are reduced and pleas entered. In this case, it is
6 important that the charge was reduced from rape to an assault with intent to commit
7 rape. It is equally important that the defendant acknowledged that the facts contained in
8 the certification of probable cause gave support to and authorized the Court to accept
9 his plea. Under the statute, a conviction is not required. However, in this case, the
10 allegations contained in the King County certification of probable cause were part and
11 parcel of the decision made by the defendant to enter an Alford plea, acknowledging
12 that there were sufficient facts to support that plea. So, the prior act did result in a
13 criminal conviction, not for something unrelated to the allegations that gave rise to that
14 charge but directly flowing from that charge and the facts contained therein. Therefore,
15 this factor favors admission under the statute.
16
17

18 **2.b(8) Whether the probative value is substantially outweighed by the**
19 **danger of unfair prejudice, confusion of the issues or misleading of the jury, or by**
20 **considerations of undue delay, waste of time or needless presentation of**
21 **cumulative evidence.** The case law interpreting ER 404(b) is helpful in this regard.
22 However, the statute does say that the restrictions and limitations in Evidence Rule
23 404(b) are not to be applied here. It is strictly an ER 403 determination. Under the case
24 law, the question is whether or not the probative value substantially outweighs the
25 danger of unfair prejudice. The prejudice in this case can be limited and isolated from.
26

1 the jury's consideration by appropriate limiting instructions. Counsel should come up
2 with those, either through discussion with themselves or with the court. Admission of
3 this evidence, when presented with the appropriate limitations and instructions to the
4 jury, will not confuse the issues or mislead the jury. It certainly would not produce undue
5 delay, a waste of time or needless presentation of cumulative evidence. There is some
6 prejudice to the defendant, as there is in everything the State presents at trial, but it is
7 not unfairly prejudicial to the defendant to have this information, which is essential to the
8 jury's function of reaching a fair and just verdict. Under the statute, the evidence should
9 be admitted.
10

11 Signed in Open Court This 30th day of ^{FEB}January, 2009

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13 

14 The Honorable Kenneth L. Cowser, Judge

15 Presented by:

16
17 Cindy A. Larsen, WSBA #26280
18 Deputy Prosecuting Attorney

19 Approved as to form:

20
21 Donald Wackerman, WSBA #
22 Attorney for Defendant
23
24
25
26

APPENDIX B

CWest's Revised Code of Washington Annotated CurrentnessTitle 10. Criminal Procedure (Refs & Annos)Chapter 10.58. Evidence (Refs & Annos)**→ 10.58.090. Sex offenses--Admissibility**

- (1) In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403.
- (2) In a case in which the state intends to offer evidence under this rule, the attorney for the state shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.
- (3) This section shall not be construed to limit the admission or consideration of evidence under any other evidence rule.
- (4) For purposes of this section, "sex offense" means:
- (a) Any offense defined as a sex offense by RCW 9.94A.030;
 - (b) Any violation under RCW 9A.44.096 (sexual misconduct with a minor in the second degree); and
 - (c) Any violation under RCW 9.68A.090 (communication with a minor for immoral purposes).
- (5) For purposes of this section, uncharged conduct is included in the definition of "sex offense."
- (6) When evaluating whether evidence of the defendant's commission of another sexual offense or offenses should be excluded pursuant to Evidence Rule 403, the trial judge shall consider the following factors:
- (a) The similarity of the prior acts to the acts charged;
 - (b) The closeness in time of the prior acts to the acts charged;

- (c) The frequency of the prior acts;
- (d) The presence or lack of intervening circumstances;
- (e) The necessity of the evidence beyond the testimonies already offered at trial;
- (f) Whether the prior act was a criminal conviction;
- (g) Whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; and
- (h) Other facts and circumstances.

CREDIT(S)

[2008 c 90 § 2, eff. June 12, 2008.]

HISTORICAL AND STATUTORY NOTES

Purpose--Exception to evidence rule--2008 c 90: “In Washington, the legislature and the courts share the responsibility for enacting rules of evidence. The court's authority for enacting rules of evidence arises from a statutory delegation of that responsibility to the court and from Article IV, section 1 of the state Constitution. State v. Fields, 85 Wn.2d 126, 129, 530 P.2d 284 (1975).

The legislature's authority for enacting rules of evidence arises from the Washington supreme court's prior classification of such rules as substantive law. See State v. Sears, 4 Wn.2d 200, 215, 103 P.2d 337 (1940) (the legislature has the power to enact laws which create rules of evidence); State v. Pavelich, 153 Wash. 379, 279 P. 1102 (1929) (“rules of evidence are substantiative law”).

The legislature adopts this exception to Evidence Rule 404(b) to ensure that juries receive the necessary evidence to reach a just and fair verdict.” [2008 c 90 § 1.]

Application--2008 c 90 § 2: “Section 2 of this act applies to any case that is tried on or after its adoption.” [2008 c 90 § 3.]

Reviser's note: Section 2, chapter 90, Laws of 2008 was approved by the legislature on March 20, 2008, with an effective date of June 12, 2008.

CROSS REFERENCES

Admissibility of evidence of rape victim's past sexual behavior, see § 9A.44.020.

West's RCWA 10.58.090, WA ST 10.58.090

Current with 2009 Legislation effective through July 1, 2009

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END OF DOCUMENT

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,

Respondent,

MICHAEL GRESHAM,

Appellant.

NO. 62862-3-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF JULY, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING THE MANNER INDICATED BELOW:

[X] SETH FINE SNOHOMISH COUNTY PROSECUTING ATTORNEY 3000 ROCKEFELLER EVERETT, WA 98201	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] MICHAEL GRESHAM 788272 WASHINGTON STATE PENITENTIARY 1313 N 13 TH AVE WALLA WALLA, WA 99362	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON, THIS 14TH DAY OF JULY, 2009.

X _____

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